HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

Writ Appeal Nos.358, 463, 482, 483, 484 and 485 of 2007

Writ Appeal No.358 of 2007

Between:

Transmission Corporation of A.P. Limited
(AP TRANSCO), represented by its Chairman
and Managing Director, Hyderabad.

…Appellant

And

M/s. Gautami Power Limited,
Secunderabad, represented by its
Director and others.

…Respondents

Counsel for the appellant : Sri T. Anantha Babu, Senior Advocate assisted by Sri N. Jayasurya.

Counsel for respondent Nos.1 and 2 : Sri Parag Tripathi, Senior Advocate assisted by Sri V. Akshaya Babu.

Counsel for respondent No.3 : Sri C.V. Mohan Reddy, Advocate General assisted by Sri A. Satya Prasad, Special Government Pleader.

Counsel for respondent No.4 : None

Counsel for respondent No.5 : Sri A. Rajashekar Reddy, Assistant Solicitor General.

Counsel for respondent No.6 : Sri K. Venkata Rao

Writ Appeal No.463 of 2007

Between:

Transmission Corporation of A.P. Limited
(AP TRANSCO), represented by its Chairman
and Managing Director, Hyderabad.

…Appellant

And

M/s. G.V.K. Power & Infrastructure Limited,
New Delhi, represented by its
Director and others.

…Respondents

Counsel for the appellant : Sri T. Anantha Babu, Senior Advocate assisted by Sri N. Jayasurya.

Counsel for respondent Nos.1 and 2 : Sri S.R. Ashok, Senior Advocate assisted by Sri S. Chakrapani.

Counsel for respondent No.3 : Sri C.V. Mohan Reddy, Advocate General assisted by Sri A. Satya Prasad, Special Government Pleader.

Counsel for respondent No.4 : None

Counsel for respondent No.5 : Sri A. Rajashekar Reddy, Assistant Solicitor General

Counsel for respondent No.6 : Sri K. Venkata Rao

Writ Appeal No.482 of 2007

Between:

Transmission Corporation of A.P. Limited
(AP TRANSCO), represented by its Chairman
and Managing Director, Hyderabad.

…Appellant

And

M/s. G.V.K. Power & Infrastructure Limited,
New Delhi, represented by its
Director and others.

…Respondents

Counsel for the appellant : Sri O. Manohar Reddy

Counsel for respondent Nos.1 and 2 : Sri S.R. Ashok, Senior

Advocate assisted by Sri S. Chakrapani.

Counsel for respondent No.3 : Sri C.V. Mohan Reddy, Advocate General assisted by Sri A. Satya Prasad, Special Government Pleader.

Counsel for respondent No.4 : None

Counsel for respondent No.5 : Sri A. Rajashekar Reddy, Assistant Solicitor General.

Counsel for respondent No.6 : Sri K. Venkata Rao

Writ Appeal No.483 of 2007

Between:

Government of Andhra Pradesh, represented by its Principal Chief Secretary (Energy), Secretariat, Hyderabad.

…Appellant

And

M/s. Gauthami Power Limited, New Delhi, represented by its Director and others.

…Respondents

Counsel for the appellant : Sri C.V. Mohan Reddy, Advocate General assisted by Sri A. Satya Prasad, Special Government Pleader.

Counsel for respondent Nos.1 and 2 : Sri Parag Tripathi, Senior Advocate assisted by Sri V. Akshaya Babu.

Counsel for respondent No.3 : Sri T. Anantha Babu, Senior Advocate assisted by Sri N. Jayasurya.

Counsel for respondent No.4 : None

Counsel for respondent No.5 : Sri A. Rajashekar Reddy,

Assistant Solicitor General.

Counsel for respondent No.6 : Sri K. Venkata Rao

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Writ Appeal No.484 of 2007

Between:

Transmission Corporation of A.P. Limited
(AP TRANSCO), represented by its Chairman
and Managing Director, Hyderabad.

…Appellant

And

M/s. Gautami Power Limited,
Secunderabad, represented by its
Director and others.

…Respondents

Counsel for the appellant : Sri O. Manohar Reddy

Counsel for respondent Nos.1 and 2 : Sri S.R. Ashok, Senior Advocate assisted by Sri S. Chakrapani.

Counsel for respondent No.3 : Sri C.V. Mohan Reddy, Advocate General assisted by Sri A. Satya Prasad, Special Government Pleader.

Counsel for respondent No.4 : None

Counsel for respondent No.5 : Sri A. Rajashekar Reddy, Assistant Solicitor General assisted by Sri A. Satya Prasad, Special Government Pleader.

Counsel for respondent No.6 : Sri K. Venkata Rao

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Writ Appeal No.485 of 2007

Between:

Government of Andhra Pradesh, represented by its
Principal Chief Secretary (Energy),
Secretariat, Hyderabad.

…Appellant

And

M/s. G.V.K. Power & Infrastructure Limited,
New Delhi, represented by its
Director and others.

…Respondents

Counsel for the appellant : Sri C.V. Mohan Reddy, Advocate General assisted by Sri A. Satya Prasad, Special Government Pleader.

Counsel for respondent Nos.1 and 2 : Sri S.R. Ashok, Senior Advocate assisted by Sri S. Chakrapani.

Counsel for respondent No.3 : Sri T. Anantha Babu, Senior Advocate assisted by Sri N. Jayasurya.

Counsel for respondent No.4 : None

Counsel for respondent No.5 : Sri A. Rajashekar Reddy, Assistant Solicitor General.

Counsel for respondent No.6 : Sri K. Venkata Rao

:: J U D G M E N T ::

June 18, 2007

Per G.S. Singhvi, CJ

These appeals by Transmission Corporation of Andhra Pradesh Limited (AP TRANSCO) and Government of Andhra Pradesh are

directed against order dated 28.2.2007 passed by the learned Single Judge in WPMP.No.4878 of 2007 (in Writ Petition No.3827 of 2007), WPMP.No.4985 of 2007 (in Writ Petition No.3906 of 2007), and order dated 27.4.2007 passed in WPMP.No.10274 of 2007 (in Writ Petition No.3827 of 2007) and WPMP. No.10275 of 2007 (in Writ Petition No.3906 of 2007).

For deciding the issue raised in the appeals, we have culled out the relevant facts from the records of Writ Petition No.3827 of 2007 and Writ Appeal Nos.358, 483 and 484 of 2007.

M/s.Gautami Power Limited (respondent No.1 in three writ appeals) through its Director Shri S. Bhupal, who has also, in his capacity as shareholder of the company, joined as petitioner No.2, filed writ petition under Article 226 of the Constitution of India for grant of a declaration that 1.96 Million Cubic Meters of natural gas is required per day for generation of electricity from the power project set up by respondent No.1. The petitioners have also prayed for issue of a mandamus to the Government of Andhra Pradesh, A.P. Transco and Andhra Pradesh Power Coordination Committee (APPCC) to make recommendation to the Government of India and Gas Authority of India Limited (respondent Nos.4 and 5 in the writ petition) for supply of natural gas to the project of respondent No.1 as per Gas Supply Agreement dated 9.10.2000 and to provide power supply interconnectivity in terms of Articles 2.7 and 7.2 of the Power Purchase Agreement (PPA). Along with the writ petition, the petitioners filed WPMP No.4878 of 2007 for issue of an interim direction to respondent Nos.1 to 3 in the writ petition to make recommendation to respondent Nos.4 and 5 on the lines of letters dated 13.7.2006 and 7.9.2006 written for supply of natural gas for a period of 18 weeks and to provide permanent power supply and interconnectivity to the power plant for the purpose of commissioning.

The aforementioned prayers of the petitioners are founded on the following assertions:

1) That pursuant to the policy of the Government of India to invite private investment in the electricity sector and policy of the Government of Andhra Pradesh for setting up short gestation power projects by private sector, respondent No.1 submitted bid to design, finance, construct, complete, oven and operate a liquid based 300 MW capacity power project at Peddapuram, East Godavari District. The same was accepted by the State Government. Thereafter, respondent No.1 executed PPA with the then Andhra Pradesh State Electricity Board (predecessor of A.P. Transco). A similar agreement was entered by M/s.N.C.C. Power Corporation Limited, which, later on, merged with respondent No.1, and the erstwhile Andhra Pradesh State Electricity Board for setting up a
227 MW short gestation project.

2) On 22.5.1998, the Government of Andhra Pradesh agreed to the request of respondent No.1 for increase in the capacity of the power plant from 300 MW to 358.9 MW. The Government of Andhra Pradesh also recommended to the Ministry of Petroleum and Natural Gas for allocation of 1.222 MCMD to respondent No.1 and 0.74 MCMD of natural gas to M/s.N.C.C. Power Corporation Limited.

3) On 9.10.2000, respondent No.1 entered into Gas Supply Agreement with the Gas Authority of India Limited (respondent No.5 herein), which was amended from time to time and vide which respondent No.5 agreed to provide 1.96 MCMD of natural gas subject to availability.

4) That even though, pursuant to the policies framed by the Government of India and the Government of Andhra Pradesh for inviting private entrepreneurs to set up power projects, they have invested Rs.1700 crores and established the power project, the State Government, A.P. Transco and Andhra Pradesh Power Coordination Committee have not sent recommendations to

Government of India and respondent No.5 to supply natural gas necessary for commissioning the project, as was done in the case of M/s.Vemagiri Power Generation Limited (for short, 'M/s.VPGL') vide its letters dated 13.7.2006 and 7.9.2006 and, in this manner, they have been discriminated.

5) That the failure of the State Government to make recommendation to respondent Nos.4 and 5 for supply of natural gas and provide power supply and interconnectivity in terms of Articles 2.7 and 7.2 of the PPA, as was done in the case of M/s.VPGL, is wholly arbitrary and discriminatory.

The case set up by A.P. Transco, as is reflected in the affidavit of its Chief Engineer/RAC and Reforms, Shri G.V. Nagesh is that as per Gas Supply Agreement dated 9.10.2000, which was amended from time to time, respondent No.5 has agreed to supply 1.96 Million Cubic Meters of natural gas per day to respondent No.1 subject to availability of gas and that at present there is shortage of gas even for the four existing private generators who have agreements with APSEB and A.P. Transco for supply of electricity. Shri G.V. Nagesh has controverted the plea of discrimination by asserting that M/s.VPGL has entered into an amended contract for supply of electricity manufactured only from natural gas and the altered procedure for manufacturing electricity from Naptha has been abandoned whereas M/s.Gautami Power Limited (respondent No.1 herein) has not agreed to do so. For the sake of convenient reference, paragraphs 4, 7, 9 and 13 of the affidavit of Shri G.V. Nagesh are extracted below:

> 4. Presently, the situation with regard to supply of gas is critical. This has also resulted in the present shortage of electricity. There are four existing private generators who have agreements with APSEB and APTRANSCO for supply of electricity. These agreements stipulate, inter alia, that if gas was not available, they would be manufacturing electricity from Naptha and a separate price was fixed for such electricity. Purchase of electricity produced from Naptha is uneconomical and it is highly impossible for distribution licensees to purchase

electricity manufactured from Naptha. This is only designed as an emergency provision. It now transpires that the existing gas fields are manufacturing progressively lesser gas with consequent reduction in supplies to A.P. State and its generators. The exploration of new gas fields is also going on and it is hoped that after some time in future when they go into operation, further gas would be available. But as the present, the availability of gas is insufficient to be supplied to any new project. This matter has engaged the attention of the State Government and the Government of India. The Ministry of Petroleum and Natural Gas is in charge of allotment of gas. The GAIL being a Central Government Company functioning in accordance with such directives of the Ministry of Petroleum and Natural Gas that in view of the shortage of gas, the available gas should be supplied only to the existing units and as and when new fields come into operation, that gas can be made available to new generators. After due examination of this proposal, the Government of India wrote a letter dated 5.12.2005 enclosing notes of discussions which contain the following:

> "MOP&NG would like to be guided by the views of the State Government and, therefore, gas supply to the existing power projects will not be curtailed. Gas supply to the upcoming 4 IPPs can only be given when additional gas becomes available."

7. The petitioner seeks to support his untenable prayer by alleging that in the case of M/s.Vemagiri Power Generation Limited, gas has been supplied and this constitutes discrimination. The plea of discrimination is baseless. Firstly, the supply to M/s.Vemagiri Power Generation Limited is only limited for the purpose of testing the equipment and after the tests were completed, the supply was stopped. Further M/s.Vemagiri Power Generation Limited has entered into an amended contract whereunder it has agreed to supply electricity manufactured from natural gas alone and the alternate procedure for manufacturing electricity from costly Naptha was abandoned. This respondent and the four DISCOMs which are successors to the contract with the petitioner in terms of the third transfer scheme had petitioned the Regulatory Commission for amending the existing agreement with all the four new manufacturers for deletion of usage of costly alternate fuel, Naptha. After M/s.Vemagiri Power Genration Limited obliged

with the request for not using the costly Naptha for manufacturing electricity, the arguments before the Regulatory Commission were interrupted and postponed at the specific request of the petitioner's counsel. An affidavit was filed before the Regulatory Commission indicating that pursuant to signing of the amended Power Purchase Agreement (PPA) by M/s.Vemagiri Power Generation Limited, they were having a dialogue with their lenders to seek their consent for negotiation with Government of Andhra Pradesh to arrive at an amicable and viable understanding on the subject. They have submitted proposal dated 11.7.2006 to Government indicating that they are also willing to agree for amendments on similar lines of M/s.Vemagiri Power Generation Ltd. They have further through letters dated 3.10.2006, 5.10.2006, 13.10.2006 & 17.10.2006 accepted to follow the amendments as accepted by M/s.Vemagiri Power Generation Ltd. (Copies of letters enclosed). The present affidavit suppresses these developments.

9 . This respondent is no longer permitted to trade in electricity from June, 2005. It is not really a proper party to this writ petition. The petitioner has failed to implead necessary parties i.e. the four DISCOMs who may be regarded as successors to A.P. Transco as explained and to the extent of the provisions of the third transfer scheme issued under the provisions of the A.P. Electricity Reform Act, 1998.

13. The APTRANSCO has really no legal part to play in this matter. The State Government has also been impleaded unnecessarily to create confusion. The Court may also take into consideration the crucial fact that the dispute involved is basically a dispute between the generator and a licensee and so should be decided by the State Regulatory Commission under Section 86 (1)(f) of the Electricity Act, 2003. It is respectfully submitted that since the State Regulatory Commission is presently engaged in considering the questions relating to the power purchase agreement between the petitioner and the DISCOMs, it is open to the petitioner to approach the State Regulatory Commission for proper relief. Its invitation to the Court to intervene in the matter which is engaging the attention of the Regulatory Commission is not proper. It is also a matter for consideration that the interim relief and the final relief are one and the same. There is no

justification for granting any interim relief without the writ being heard."

M/s.G.V.K. Power and Infrastructure Limited (respondent No.1 in Writ Appeal Nos.463, 482 and 485 of 2007) and another filed Writ Petition No.3906 of 2007 with identical prayer. They also filed WPMP No.4985 of 2007 for grant of similar interim relief.

By an order dated 28.2.2007, the learned Single Judge disposed of WPMP Nos.4878 and 4985 of 2007 and directed respondent Nos.4 and 5 in the writ petition (respondent Nos.5 and 6 herein) to extend the same facility to the petitioners as was done in the case of M/S.VPGL with the rider that A.P. Transco shall not be exposed to any additional financial commitment or burden on account of commissioning of the power project. The relevant portions of the order passed by the learned Single Judge are extracted below:

> "The feasibility of granting the main relief claimed in the writ petition can be considered, after all the respondents file their counter-affidavits or put forward their contentions. The limited question, at this stage, is as to whether necessary directions need to be issued to the respondents concerned, to ensure supply of gas and connectivity of power to the petitioners, to enable the petitioners to commission the plants. The existence of the corresponding agreements, between the concerned agencies is not disputed.
>
> In the State of Andhra Pradesh, as many as eight such units have been permitted to come into existence. Out of them, four have become operational, one is in the process of commissioning and the other three including the petitioners, are yet to commence their production. For their functioning, the units depend almost exclusively upon the supply of gas by the fifth respondent. It may be that the agreements provide for alternative method of production of power also. That, however, became a bone of contention between the units and the second respondent, which is reluctant to purchase the power produced through the alternative fuels. The matters in this regard are said to be pending before the Regulatory Commission.
>
> It hardly needs any mention that on the basis of the commitment received from various agencies, including respondents 2 and 5, the petitioners have incurred huge

expenditure. Construction and installation of plants entail in agreements with Indian and foreign agencies. The installation of the plants is said to have been completed. Unless the plants are commissioned, the petitioners would be exposed to damages by different agencies. It is represented that by now one of the petitioners had to shell down 200 crores in the form of damages, paid to the foreign companies, on account of the delay in commissioning.

Respondents 2 to 5 contend that the gas is not available in such a quantity to fulfil the commitments to the various power plants to enable them to operate, to the optimum capacity or to commission, as the case may be. The situation as of now is that four plants are already functioning, one is on the test run and the three are yet to be commissioned. The petitioners have placed voluminous record before this Court in support of their contention that there is adequate quantity of gas with the fifth respondent and that, at any rate, the available quantity must be supplied pro rata. Though it is stated that a change of policy has ensued since then, it is yet to crystalise into an enforceable one.

Be that as it may, the commissioning of plant of the petitioner, if at all anything, would be beneficial to the second respondent. The reason is that the power generated through gas is said to be cheaper when compared to the one produced through other fuel. The apprehension of the second respondent that it may be exposed to severe financial burden, if the petitioners resort to production of power through other methods such as NAFTHA can be allayed by directing that the gas that may be supplied to the petitioners for the present shall be limited to the extent of enabling them to commission the units and not beyond that. Even the method of commissioning is prescribed under the relevant clauses of agreement and the programmes have already been scheduled for this purpose. The period is spread over 19 weeks. Further, such a commissioning would extricate the petitioners from the liability, to which they may be exposed vis-à-vis the EPC contractors engaged by it as well as the financial institutions for delay in this regard. The purport of the stand taken by the fifth respondent in W.P.No.22051 of 2005 in its counter-affidavit or its effect on the agreements entered into in favour of the agencies, needs to be considered at the final hearing of the writ petition.

Another fact, which persuades this Court to grant interim

relief, is that on its own accord, the fifth respondent extended gas supply to a unit by name Vemagiri in the recent past. The power supply was followed by a recommendation by the State Government itself through letter dated 13.07.2006. The petitioners stand on the same footing. There is no reason why the same treatment cannot be extended to the petitioners also.

For the foregoing reasons, the W.P.M.Ps. are ordered. Respondents 4 and 5 shall extend the same facility to the petitioners as they did to Vemagiri Power Generation Limited, and subject to the same terms except as to amendment of power purchase agreement. Further, the second respondent shall not be exposed to any additional financial commitment or burden on account of such a commissioning. It is also made clear that the observations made herein shall not be treated as any final pronouncement and the proceedings pending before the A.P. Electricity Regulatory Commission between the parties herein shall be adjudicated on their own merits, uninfluenced by any observations made in this order."

On 17.4.2007, the petitioners of both the cases filed miscellaneous petitions, which were registered as WPMP Nos.10274 and 10275 of 2007 with the prayer that respondent No.5 be directed to supply gas in accordance with order dated 28.2.2007 passed in WPMP Nos.4878 and 4985 of 2007.

In the affidavit filed by him in support of the miscellaneous petitions, Shri S. Bhupal referred to letter dated 23.3.2007 sent by respondent No.5 and averred that non-implementation of the direction given by the Court on 28.2.2007 is causing heavy financial loss to the writ petitioners and they are being threatened by EPC Contractors – M/s.Alstom to decommission from the project site.

The appellants contested the second set of miscellaneous petitions by asserting that in view of acute shortage of power during the summer season, it may not be feasible or advisable to divert the gas supply to the petitioners and that allocation of gas to the petitioners will result in curtailment of supply to the existing units.

The learned Single Judge took cognizance of the aforementioned assertion made on behalf of the appellants and

passed order dated 27.4.2007 whereby he directed that respondent No.5 should supply gas to the petitioners with effect from 15.7.2007 with a further direction that in the meanwhile, the A.P. Transco, State Government and the Government of India shall undertake necessary correspondence so as to enable respondent No.5 to commence supply by the specified date for the limited purpose of commissioning of the project. The last two paragraphs of the second order of the learned Single Judge are extracted below:

> "The petitioners are the units, which have come into existence, on the basis of a multilateral agreement, among the petitioners and several agencies. The agreements provide for supply of gas by the 5th respondent to the petitioners and purchase of the generated power by the 2nd respondent. It is no doubt true that several claims and counter claims are being made by the respective parties, against each other, as regards enforcement of their respective rights. The purport of the order passed by this Court on 28.2.2007 is very limited. Directions were issued to the respondents therein, to supply gas to the petitioners, only to the limited extent of commissioning the units. A rider was added to the effect that mere commissioning of the units, shall not result in any additional financial commitment, or burden, to the respondents.
>
> For the submissions made on behalf of the various respondents, it now emerges that it would not be possible to divert any gas to the petitioners and that any such diversion would result in shortage of supply to the existing functional units. An apprehension expressed on their behalf is that the petitioners may declare the Commercial Operation Date (COD), soon after commissioning, and that the same would entail in financial liability of high magnitude to the respondents. On a consideration of the various issues involved in the matter, this Court is of the view that the gas supply to the petitioners can be commenced from the 2nd week of July 2007, and that the petitioners be required to declare the COD, only with the leave and permission of the Court.
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> Hence, both the petitions are ordered, directing that:
>
> a) The supply of gas to the petitioners shall be commenced by the 5th respondent, with effect from 15.7.2007, and in the meanwhile, the respondents, and in particular, the A.P.

Transco, Government of Andhra Pradesh and Government of India, shall undertake necessary correspondence, to enable the 5th respondent, to commence supply by that date, for the limited purpose of

b) commissioning of their respective units.

c) The petitioners shall declare their Commercial Operation Date, only with the leave of the Court, and not otherwise."

Shri T. Anantha Babu, learned Senior Counsel appearing for A.P. Transco referred to the provisions of the Electricity Act, 2003 (for short, 'the 2003 Act') and submitted that in view of transfer of the entire work relating to generation and distribution of electricity to four distribution companies, the learned Single Judge should not have entertained the writ petitions without insisting on the impleadment of the distribution companies as parties. Learned Senior Counsel submitted that once the power project of respondent No.1 is commissioned and the date of commercial operations is declared, A.P. Transco will have to purchase electricity, which is prohibited by virtue of Section 39 of the 2003 Act. He submitted that after commissioning of the project, respondent No.1 will declare the date of commercial operations and compel A.P. Transco to purchase the power generated from

gas as also the alternative fuel i.e. Naptha, which is very costly.

Shri Anantha Babu further submitted that respondent No.6 is not in a position to supply gas even to the existing generating companies and, therefore, respondent No.1 is bound to generate electricity by use of Naptha and the electricity supplied by it to A.P. Transco will be very costly. Lastly, he submitted that the relief claimed by the petitioners in the main petition and miscellaneous petitions is almost identical and the learned Single Judge committed a serious error by granting relief, which has the effect of finally disposing of the writ petition.

Shri C.V. Mohan Reddy, learned Advocate General appearing for the State argued that the direction given by the learned Single Judge for supply of gas to respondent No.1 at par with M/s.VPGL is

legally unsustainable because the cases of the writ petitioners are not identical to that of M/s.VPGL. In reply to the Court's query, the learned Advocate General admitted that even after the policy decision was taken in the meeting held on 29.11.2005 between the Secretary, Ministry of Petroleum and Natural Gas and Minister of Energy, Government of Andhra Pradesh at New Delhi that gas supply to the existing power projects will not be curtailed and the coming up units will be supplied gas only on the availability of additional quantity, letter dated 13.7.2006 was written by the State Government to the Government of India recommending supply of natural gas to M/s.VPGL for the purpose of commissioning its unit and respondent No.6 did supply the gas to M/s.VPGL, but argued that non-making of recommendation in favour of the writ petitioners cannot be treated as discriminatory because M/s.VPGL had agreed not to manufacture gas by using the alternative fuel i.e. Naptha whereas respondent No.1 has declined to amend the existing agreement. He then argued that the learned Single Judge gravely erred by directing supply of gas to the writ petitioners without even considering the elements of irreparable injury, balance of convenience and public interest. Learned Advocate General pointed out that at present, four companies engaged in generating electricity require minimum 4.85 Million Cubic Meters of natural gas per day whereas respondent No.6 is able to supply only 2.974 Million Cubic Meters of gas per day and argued that if the order of the learned Single Judge is implemented, respondent No.6 will have to curtail the supply of gas to the existing generating companies resulting in acute shortage of power availability in the State.

Shri O. Manohar Reddy, learned counsel appearing for A.P. Transco in Writ Appeal Nos.482 and 484 of 2007 adopted the arguments of Shri T. Anantha Babu and the learned Advocate General and further argued that the learned Single Judge committed a serious jurisdictional error by passing an order for supply of gas to the writ petitioners ignoring the fact that no such prayer has been made in the

writ petitions or the miscellaneous petitions.

Shri K. Venkata Rao, learned counsel for respondent No.6 gave out that at present only 4 Million Cubic Meters of gas is available per day for supply to the generating companies in the State of Andhra Pradesh out of which 0.9 Million Cubic Meters gas is being supplied to A.P. Power Generating Corporation and about
3 Million Cubic Meters gas is supplied to the four other generating companies whereas their minimum requirement is more than 4 Million Cubic Meters of gas per day. Learned counsel submitted that gas was supplied to M/s.VPGL for the purpose of commissioning the unit by reducing supply to the generating companies because of the recommendations of the State Government and the Government of India. He submitted that at present, no gas is being supplied to M/s.VPGL. He then submitted that if respondent No.6 is compelled to supply gas to the writ petitioners for a period of 18 weeks, then this will have to be done by curtailing supply to the four existing power generating companies, who will then be forced to reduce the generation of electricity.

Shri Parag Tripathi, learned Senior Counsel appearing for M/s.Gautami Power Limited relied on the judgments of the Supreme Court in **Wander Ltd. v. Antox India (P) Ltd.**[1] and **N.R. Dongre v. Whirlpool Corporation**[2] and argued that the orders impugned in these appeals are most innocuous and equitable, and therefore, the Division Bench may not interfere with the same. Shri Tripathi and Shri S.R. Ashok (Senior Counsel appearing for M/s.G.V.K. Infrastructure and Power Limited) emphasized that after having invited respondent No.1 to set up power project by investing Rs.1700 crores, the State Government cannot refuse to recommend supply of gas for commissioning of the project and the learned Single Judge did not commit any illegality by directing respondent No.6 to supply gas for a short period of 18 weeks. They further argued that the case of the writ

petitioners is identical to that of M/s.VPGL, in whose favour recommendations were made by the State Government and others for supply of gas for commissioning the project and, therefore, the direction given by the learned Single Judge cannot be faulted. Both Shri Tripathi and Shri S.R. Ashok submitted that if the writ petitioners are not allowed to commission the project, they will be put to grave financial injury and serious legal complications would arise. They further submitted that the interest of the appellants has been amply safeguarded by the learned Single Judge by directing that A.P. Transco shall not be exposed to any additional financial commitment or burden on account of such commissioning and the date of commercial operation shall not be declared without the leave of the Court. Shri S.R. Ashok referred to the averments contained in the affidavit of Shri G.V. Nagesh to show that power was supplied to M/s.VPGL after it had agreed not to use alternative fuel i.e. Naptha and argued that recommendations are not being made in favour of his client solely because of the latter's disinclination to agree to the amendment of the agreement. Learned counsel submitted that the appellants should not be allowed to use arm-twisting methods for forcing respondent No.1 to agree for amendment of the terms and conditions of supply. In the end, both Shri Tripathi and Shri S.R. Ashok submitted that the bogie of the non-availability of the gas is being raised to subvert the rightful claim of their clients for supply of gas for the purpose of commissioning of the project solely because they did not agree to the arbitrary demand made by the appellants for modification of the terms of agreement.

We have given serious thought to the entire matter. The parameters for exercise of the High Court's power to pass an order of injunction or stay in a petition filed under Article 226 of the Constitution of India are well-settled. The Court must feel convinced that the petitioner has been able to make out a strong

prima facie case; that the balance of convenience is in favour of grant of interim order; that in the event of non-grant of interim relief, the petitioner will suffer irreparable injury and that public interest warrants exercise of discretion by the Court in favour of passing an interim order. The consideration of these factors must be reflected in the order of injunction or stay, moreso when such an order is mandatory in character. The admission of the writ petition or issue of notice to the opposite party is only indicative of the Court's willingness to examine on merits the issue raised by the petitioner in regard to the violation of his legal or constitutional rights or arbitrary or mala fide exercise of power by the State or its instrumentalities/agencies. In other words, admission of the writ petition can be treated as indicative of the existence of prima facie case in favour of the petitioner. However, that, by itself, is not sufficient for passing an order of stay or interim injunction

ex debito justitiae. Whenever a prayer for interim injunction or stay is made, the Court is duty bound to examine all the relevant factors and feel convinced that if the interim relief prayed for is not granted, the petitioner will suffer an injury, which cannot be compensated in terms of money or otherwise. The High Court must also feel satisfied that the injury to be suffered by the petitioner by non-grant of interim injunction or stay will be much more than the injury, which may be suffered by the non-petitioners on account of grant of interim injunction etc. The need for protecting the right of the petitioner must always be weighed against the corresponding need of protecting the non-petitioners against the injury which they may suffer in the event of grant of injunction or stay. Where the action of the State and/or its agencies/instrumentalities is challenged on the ground of violation of legal or constitutional right of the petitioner and there is a clash of the right of the individual or group of individuals on the one hand and the right of the public at large on the other hand, the Court must carefully examine the entire matter and ensure that the public interest is not

sacrificed in the name of protecting the individual right. If an order of injunction or stay is likely to prejudice the public cause or inflict injury on the members of the public by means of deprivation of basic amenities, the Court should be extremely loath and circumspect in entertaining the prayer for interim relief. In **Wander Ltd. v. Antox India (P) Ltd.** (supra), the Supreme Court reiterated the above noted principle in the following words:

> "Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated
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> > "...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies."
>
> The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted."

The Supreme Court also dealt with the scope of the appellate

Court's power to interfere with the exercise of discretion by the Court of first instance, referred to an earlier judgment in **Printers (Mysore) Pvt. Ltd. v. Pothan Joseph**[3] and held:

> " The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

The facts of that case were that respondent had filed suit for injunction restraining the appellants from passing of their medicinal product "Cal-DeC" by contending that it had acquired a right in that trade mark by continuous user. The learned Single Judge of the Madras High Court refused the plea for temporary injunction, but, on appeal, the Division Bench granted temporary injunction. On further appeal, their Lordships of the Supreme Court referred to the parameters which are required to be kept in mind for grant of injunction and proceeded to hold that the Division Bench committed an error by upsetting the order of the learned Single Judge.

I n **N.R. Dongre v. Whirlpool Corporation** (supra), the Supreme Court reiterated the principle laid down in **Wanders Ltd. v.**

Antox India (P) Ltd. (supra) and refused to interfere with the order of injunction passed by the learned Single Judge of Delhi High Court, which was confirmed by the Division Bench restraining the appellant from using the trade mark 'Whirlpool' for manufacturing, selling and advertising certain goods. Some of the observations made in that case are extracted below:

> "Injunction is a relief in equity and is based on equitable principles. On the above concurrent findings, the weight of equity at this stage is in favour of the plaintiffs and against the defendants. It has also to be borne in mind that a mark in the form of a word which is not a derivative of the product, points to the source of the product. The mark/name 'WHIRLPOOL' is associated for long, much prior to the defendants' application in 1986 with the Whirlpool Corporation, Plaintiff 1. In view of the prior user of the mark by Plaintiff 1 and its trans-border reputation extending to India, the trade mark 'WHIRLPOOL' gives an indication of the origin of the goods as emanating from or relating to the Whirlpool Corporation, Plaintiff 1. The High Court has recorded its satisfaction that use of the 'WHIRLPOOL' mark by the defendants indicates prima facie an intention to pass off the defendants' washing machines as those of the plaintiffs or at least the likelihood of the buyers being confused or misled into that belief. The fact that the cost of the defendants' washing machine is 1/3rd of the cost of the plaintiffs' washing machine as stated by Shri Sibal, itself supports the plaintiffs' plea that the defendants' washing machines are not of the same engineering standard and are inferior in quality to the washing machines of the plaintiffs. In addition, it has been rightly held that the grant of interlocutory injunction would cause no significant injury to the defendants who can sell their washing machines merely by removing the small metallic strip bearing the offensive trade mark/name which includes 'WHIRLPOOL '. On the other hand, refusal of the interlocutory injunction would cause irreparable injury to the plaintiffs' reputation and goodwill since the trade mark/name 'WHIRLPOOL' is associated for long because of prior user and even otherwise with Plaintiff 1, Whirlpool Corporation. These factors which have been relied on for grant of the interlocutory injunction by the trial court indicate that the exercise of discretion was in accordance with the settled principles of law

relating to the grant of interlocutory injunctions in a passing-off action. The affirmance of the trial court's order by the Division Bench on an appeal reinforces the trial court's view."

In the light of the above, we shall now consider whether the learned Single Judge was justified in issuing a mandatory interim direction to respondent No.6 to supply gas to the writ petitioners with effect from 15.7.2007 with a further direction to A.P. Transco, Government of Andhra Pradesh and Government of India to undertake necessary correspondence to enable respondent No.6 to commence supply of gas by 15.7.2007.

Since the writ petitions have already been admitted, it can reasonably be said that the petitioners have been able to make out a prima facie case for consideration by the Court. Therefore, the core issue which needs to be looked into is whether the factors of balance of convenience, irreparable injury and public interest warranted interlocutory intervention by the learned Single Judge and whether a mandatory interim order could be passed beyond the scope of the prayer made in the main petition.

A reading of order dated 28.2.2007 shows that the learned Single Judge took cognizance of the grievance made by the writ petitioners that even though, on being induced by the State Government, they have invested hundreds of crores for setting up the power projects, but the State and its agencies and respondent No.6 are not providing facility for commissioning of the projects and delay in this regard would inflict heavy financial injury on them. The learned Single Judge also briefly referred to the plea of discrimination raised by the petitioners and directed the Government of India and the Gas Authority of India Limited to extend the same facility to the petitioners as was done in the case of M/s.VPGL with the rider that the A.P. Transco shall not be exposed to any additional financial commit or burden on account of commissioning of the project. In the second order, the learned Single Judge did take cognizance of the submission

made on behalf of the non-petitioners that it would not be possible to divert the gas to the petitioners because such diversion would result in shortage of supply to the existing functional units, but, without considering the fact that any reduction in the supply of gas to the existing functional units will have serious adverse impact on the generation of electricity in the State and the people, educational institutions, industrial and commercial establishments will face acute shortage of electricity, directed the supply of gas to the petitioners with effect from 15.7.2007.

There is nothing in either of the above noted orders to show that before issuing mandatory interim direction for supply of gas to the project of the petitioners, the learned Single Judge considered the factors of irreparable injury, balance of convenience and public interest. In our considered view, failure of the learned Single Judge to consider the factors relevant for exercise of the Court's power to grant interim relief has resulted in miscarriage of justice and, therefore, the orders under challenge calls for interference.

It is true that the petitioners invested substantial amount for setting up power project in the private sector and entered into various agreements with the Government of Andhra Pradesh, A.P. Transco and others. It is also true that delay in commissioning of the project is likely to case financial loss to the petitioners. However, it is extremely debatable whether in exercise of power under Article 226 of the Constitution of India, this Court can issue a mandamus to the respondents for enforcing the terms of agreements which do not have statutory backing or flavour. In any case, the learned Single Judge could not have, without giving due weightage to the assertion made on behalf of the respondents in the writ petitions regarding non-availability of gas, and the fact that any direction for supply of gas to the petitioners will result in reduction in the supply of gas to the existing units and thereby adversely affect the generation of electricity, passed

mandatory interim order and that too beyond the scope of the prayer made in the main petition.

The petitioners (respondent No.1 in these appeals) have not produced any material before us to controvert the assertion that for the present, even the existing generating units cannot be supplied gas as per their requirement and if the gas is to be supplied to respondents No.1 for commissioning of their project, the supply of gas to the existing units will have to be reduced. Therefore, we do not find any reason to discard the statement made by Shri K. Venkata Rao that implementation of the direction given by the learned Single Judge will force respondent No.6 to curtail the supply of gas to the existing units, which are already facing shortage of gas. If the statement of the learned counsel is to be believed and there is no reason for us to doubt its correctness, the demand of the existing units is more than 4 Million Cubic Meters of natural gas per day and they are being supplied only

3 Million Cubic Meters of gas per day. This shows that the existing units are not in a position to generate electricity to their optimum capacity and, on that account, the distribution companies are compelled to resort to load shedding. The agricultural and industrial sectors are worst affected on account of power shortage. If, in this scenario, respondent No.6 is forced to supply gas to respondent No.1 for commissioning of the project, the supply of the existing units is bound to be curtailed for a period of over four months. This would cause incalculable harm to the people of the State, particularly those engaged in agricultural and industrial operations. The other segments of the society will also have to bear the brunt due to shortage of electricity. If the injury likely to be suffered by the writ petitioners on account of non-supply of gas for commissioning their project is weighed against the injury likely to be caused to the various segments of the population of the State and particularly those engaged in

productive activities, it is impossible to say that the balance of convenience is in favour of the writ petitioners.

We are further of the view that it will be totally against public interest to compel respondent No.6 to supply gas to the writ petitioners by curtailing supply to the existing units engaged in the generation of electricity.

On the basis of the above discussion, we hold that the learned Single Judge arbitrarily exercised the discretion to pass interlocutory order without considering three important factors i.e. irreparable injury, balance of convenience and public interest and, therefore, the orders under challenge are liable to be declared as vitiated by an error of law apparent on the face of the record and is liable to be set aside.

In the result, the appeals are allowed. The orders passed by the learned Single Judge are set aside. Needless to say that the observations made in this judgment shall not adversely affect final adjudication of the writ petitions.

The petitioners (respondent No.1 in the appeals) are given liberty to apply to the learned Single Judge for early hearing of the writ petitions.

As a sequel to disposal of the appeals in the manner indicated above, WAMP Nos.679, 868, 925, 926, 927 and 928 of 2007 filed by the appellants are disposed of as infructuous.

G.S. SINGHVI, CJ

June 18, 2007

C.V. NAGARJUNA REDDY, J

Note:
L.R. copy be marked.
(By order)

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[1] 1990 (Supp.) SCC 727

[2] (1996) 5 SCC 714

[3] AIR 1990 SC 1156